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December 4, 1995

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Re: **EXPEDITED REVIEW REQUESTED**

Joint Industry Letter Submission
38.6 - 40.0 GHz Licensing & Service Rule Issues

RM-8553

Dear Commissioners:

The undersigned parties hold authorizations and/or are currently prosecuting applications to construct and operate Point-to-Point Microwave Radio Service facilities in the 38.6 - 40.0 GHz band (the "38 GHz band") at various locations throughout the United States (hereinafter the "38 GHz Coalition" or the "Coalition"). The concerns addressed here by the Coalition arise out of the Commission efforts to prepare a Notice of Proposed

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Rulemaking ("the NPRM") that stems to some degree from a petition filed on September 9, 1994 by the Telecommunications Industry Association (the "TIA Petition"). See RM 8553, Public Notice Report No. 2044 (released December 1, 1994). The TIA Petition seeks to open the 37.0 - 38.6 GHz band (the "37 GHz band") for new Point-to-Point Microwave Radio Service systems, and to modify certain of the Commission's technical standards that will govern future licensing and operations in both the 37 GHz and the 38 GHz bands.

Specifically, the Coalition is forwarding this letter to urge the Commission to:

- 1) **Continue to timely issue licenses to pending uncontested 38 GHz applicants and to encourage post-filing frequency conflict resolutions;**
- 2) **Preserve current rules that provide for "blanket" system deployment authority throughout an authorized service area; and**
- 3) **Continue to support rules and policies that otherwise allow the marketplace to determine the ultimate mix of system capacity, services, and service providers.**

Simply put, an emerging new competitive local broadband wireless industry is attempting to deploy systems *today*, pursuant to a long-established and workable rule structure. This industry could be severely crippled or even killed by a rulemaking proceeding that, ostensibly, is intended to avoid regulatory delay and uncertainty, and to speed the delivery of new services to the public. Such a result would clearly be contrary to the public interest; translating into the curtailment of innovative new competitive service offerings, the loss of many new jobs, and the squandering of millions of dollars of scarce investment capital. To avoid such a clearly undesirable outcome, the Coalition implores the Commission to pay careful attention in the NPRM to the key issues identified herein, as well as the indisputable underlying equities.

I. Who Is The 38 GHz Coalition?

The 38 GHz Coalition is an informal group of 38 GHz pioneers that share common concerns relating to possible Commission efforts to modify applicable Point-to-Point Microwave Radio Service Rules and policies. Each Coalition member has played an instrumental role in the development of innovative new services in the 38 GHz band, which until only recently had remained fallow for many years. It is only through the concerted work and cumulative investment of millions of dollars by the entities forming the Coalition, as well as a other similar entities, that the 38 GHz band has recently become viable for a host of new local wireless broadband distribution services.

The Coalition's members are representative of the 38 GHz community as whole, which is made up almost entirely of companies with long experience in the telecommunications field. Though some Coalition members are relatively new to the field of wireless telecommunications, a vast majority are not. In fact, the 38 GHz industry, including the companies that form the Coalition, collectively employs individuals that together have *thousands* of man-years of experience in designing, deploying, and/or operating a wide variety of wireless systems. These include networks in a variety of wireless local distribution services, such as MDS, MMDS, DTS, CARS and LMDS, as well as a range of commercial mobile radio service systems. In addition to their involvement and investment in the development of the 38 GHz band, some Coalition members have also been instrumental in pioneering other new services such as MDS, MMDS, DTS, and LMDS.

Contrary to wholly unsubstantiated rumors that have apparently been spread at the Commission alleging "speculation", there is a clear and strong commitment among all Coalition members, and the 38 GHz industry as a whole, to realize success in the implementation of 38 GHz systems across the United States. While there may be some differences of opinion as to specific service plans, all members of the Coalition are fully committed to the development of a robust 38 GHz wireless broadband service. This high level of commitment is characteristic of the entire 38 GHz community, as evidenced by the level of investment to date, as well as the attention of companies to the application prosecution and frequency conflict resolution process.

II. A Clear And Present Need For 38 GHz Services Has Been Conclusively Demonstrated

Collectively, the Coalition's members have expended substantial time and money to conduct extensive market analyses, to develop business plans, and to implement aggressive market entry strategies. These efforts are characteristic of the clear commitment to the early initiation of service evidenced throughout the 38 GHz industry. Furthermore, these efforts, combined with those of others, clearly demonstrate that an immediate need exists in the marketplace for a range of 38 GHz point-to-point local distribution services.

Contrary to some early predictions of several years ago that the principal 38 GHz application was the provision of backhaul for PCS systems and other mobile networks, it is readily apparent today that the market demand for 38 GHz point-to-point transmission services is far more diverse than originally anticipated. Based on input from Coalition members and others, the principal market opportunities for 38 GHz services can be characterized in several major categories that include, but are not limited to the following:

- Local access for long distance providers;
- Competitive local exchange and private network services;
- Distance education and telemedicine;
- Wireless Internet access;
- Network redundancy & Emergency service restoration; and
- Backhaul connections for PCS and other mobile systems

While the individual market entry strategies and deployment plans of the Coalition's members may differ somewhat, there is a unanimous consensus that any regulatory delay will have a detrimental, if not fatal effect on the 38 GHz industry. There is not only an immediate need for service, there is also tremendous market entry pressure caused by the rapid growth of alternative competing broadband wireless and wireline technologies.

In this regard, it should also be noted that a common thread among many 38 GHz operator's business plans is the concept of market presence in multiple metropolitan areas. Multiple-market or nationwide presence is viewed by many as critical to meeting large customer service demands in the local access services sector, as well as other market segments that entail customers with multi-city service requirements. Additionally, the system deployment cost models for many 38 GHz operators assume that advantage can be taken of the economies of scale that will be achieved through presence in multiple markets. As a result, any artificial Commission alteration of multi-market business plans, such as an application processing disruption, could have a serious "ripple" effect on many 38 GHz licensees, causing deployment costs to increase and inhibiting the ability of operators to compete effectively in the marketplace.

Given the immediate market opportunities and the fiercely competitive environment for local distribution service providers, the Coalition believes it is essential that the Commission understand the real and immediate threat to a viable competitive 38 GHz industry that licensing delays would represent. The Commission must act pragmatically to promote this growing industry, and avoid sending signals of uncertainty or hesitancy to the marketplace and the financial community.

III. 38 GHz Processing, Licensing & Service Rule Issues

Based on a series of recent conversations with Commission staff, the 38 GHz Coalition understands that the Commission is likely to address a range of issues in the NPRM relating to 38 GHz licensing and service rules. It should be noted that the primary focus of the TIA Petition was proposals relating to the establishment of licensing rules for the heretofore unused 37 GHz band. TIA offered only a very limited discussion of certain technical standards issues that affect both the 37 GHz and the 38 GHz bands.^{1/} Nevertheless, the Commission has apparently chosen, consistent with its rulemaking authority, to widen the scope of the NPRM to include 38 GHz licensing and service rule issues not raised by the TIA Petition, or by the two companies

^{1/} It is also notable that only two companies filed comments when the TIA Petition was placed on public notice by the Commission.

that filed comments on the TIA Petition.^{2/} Because the terms of reference for the NPRM have apparently been expanded without a formal opportunity for public comment, the Coalition believes that prior to finalizing the text of the NPRM and taking any further action relating to 38 GHz licensing, the Commission should take full account of the important equitable and public interest concerns set forth in this letter.

A. Continue To Issue 38 GHz Licenses And Encourage Engineering Solutions To Frequency Conflicts

The Coalition urges the Commission to continue to timely issue licenses to pending uncontested 38 GHz applicants that are otherwise in conformance with existing 38 GHz licensing rules. These applicants filed their applications pursuant to well-established licensing and service rules, and are clearly entitled to adjudication pursuant to these rules. Furthermore, the Coalition members, and virtually all of the other 38 GHz companies have expended substantial technical and financial resources to bring their applications into conformance with a series of FCC policy edicts set forth in a September 16, 1994 Public Notice.^{3/} Any attempt to impose new licensing policies on these applicants at this juncture would be grossly unfair.

Any deviation in 38 GHz application processing policy would cause unnecessary delays in the delivery of important new competitive telecommunications services to the public and irreparable economic harm to the 38 GHz industry. In fact, as discussed above, in many circumstances, a disruption of processing could have a serious "ripple" effect on currently authorized 38 GHz systems by diminishing or destroying economies of scale that had been reasonably relied upon by 38 GHz operators in their business planning process.

It is quite clear from the evidence at hand that any disruption in processing would violate the equitable rights of the pending 38 GHz applicants. Any Commission action to halt the processing of applications filed prior to the 38 GHz Application

^{2/} See, e.g., *Application Filing Freeze Order, slip op.*, DA 95-2341 (released November 13, 1995) (the "38 GHz Application Freeze Order").

^{3/} See Public Notice Re: Policy Governing the Assignment of Frequencies In The 38 GHz And Other Bands To Be Used In Conjunction With PCS Support Communications, FCC Public Notice No. 44787 (released September 16, 1994).

Freeze would clearly be in contravention of the public interest. Given all of these circumstances, it is clear that the Commission must maintain consistency and continue to issue 38 GHz authorizations.

Of course, the Commission should also continue to accept and process amendments to pending applications.^{4/} To facilitate orderly processing of the remaining 38 GHz applications that are pending at this time, the Commission should also allow continuation for at least ninety days after issuance of the NPRM the informal industry process of post-filing frequency conflict resolution. The issuance of 38 GHz system authorizations should be continued until all such applications filed prior to the effective date of the 38 GHz Application Freeze Order have been processed.

It is important for the Commission to note that through completely voluntary means, Coalition members and others have resolved or are in the process of resolving a vast majority of the existing cases of 38 GHz mutual exclusivity. These resolutions have been achieved through engineering solutions involving channel plan and/or service modifications, and in some cases, application dismissals. Contrary to another bit of disinformation that has come to the Coalition's attention, to the best knowledge of each of the Coalition's members, no exchange of monetary consideration has ever occurred in the resolution of any 38 GHz mutual exclusivity conflict.

As a result of the concerted engineering efforts of the Coalition's members and others, a vast majority of the pending 38 GHz applications are currently uncontested and eligible for immediate grant. Of the few 38 GHz applications that presently remain mutually exclusive, the overwhelming majority entail two-party conflicts that can be readily resolved through frequency plan amendments, minor alterations of service areas, or through voluntary application dismissals.

In stark contrast to application processing situations in some other services (e.g., MDS and 900 MHz paging), 38 GHz applicants are in a decidedly different posture than the multi-party speculative frequency conflicts that have resulted from mass "application mill" filing onslaughts with hundreds and even thousands of applicants filing mutually exclusive applications.

^{4/} The Commission has recently made clear that administrative submissions, such as transfer of control applications will be accepted and processed throughout the pendency of the upcoming rulemaking. See 38 GHz Application Filing Freeze Order, at ¶ 2. See, also, Infra, at Section III(C).

It is imperative that the Commission take no steps now or in the future to destroy the rights of presently pending applicants who have spent several millions of dollars in developing business plans and prospects, resolving frequency conflicts and prosecuting applications, all in good-faith reliance on the Commission's long-established existing rules.

Finally, as a general matter, the Coalition wants to make clear that it does not oppose spectrum auctions. But where, as here, literally hundreds of applications that are in full compliance with the Commission's Rules may be granted forthwith, it would be singularly inequitable and contrary to the public interest to delay or jettison those applications while the Commission conducts a lengthy rulemaking in anticipation of auctions at some future date.

In sum, it is imperative that the Commission continue to process and grant uncontested 38 GHz applications, and to encourage the industry-driven post-filing conflict resolution process, regardless of the proposals set forth in the NPRM.

B. Do Not Impede The Ability of 38 GHz Licensees To Pursue Rapid System Implementation Pursuant To Existing Blanket Deployment Authority

The second main issue of paramount importance to the 38 GHz Coalition is the need to maintain the 38 GHz blanket deployment authority provided for in the current rules. As a result of recent discussions with Commission officials, the Coalition is well aware of Commission concerns over the possibility of spectrum "warehousing" in the 38 GHz band. It is clear from a careful examination of the facts, however, that these concerns are unfounded at this point in time. The vast majority of 38 GHz licenses have only been issued within the last several months when the pace of processing accelerated after long months of relative inactivity. Given these circumstances, in combination with the fact that the production of 38 GHz equipment is just now responding to market demand, there is absolutely no basis to conclude that any speculation or warehousing is occurring. Accordingly, there is no legitimate basis for the Commission to take any action at this time to alter the existing system deployment rules to combat fictional warehousing concerns.

In this regard, the ability of licensees to flexibly deploy facilities within their designated service area is the central defining feature of the current 38 GHz service rules. The Coalition's members have relied on this critical aspect of the

rules in developing and financing their business plans. In fact, a number of the Coalition's members are currently committed to aggressive multi-million dollar deployment models that are fully dependent on blanket authority to place and remove individual point-to-point transmission paths on short notice in response to evolving market demand. Any determination at this point that 38 GHz spectrum is being inefficiently utilized would certainly appear to be premature.

Likewise, the same unique flexible deployment characteristics of this new point-to-point service that are key to meeting highly competitive marketplace requirements make it extremely difficult, if not impossible to determine today what if any minimum construction benchmarks should be imposed. Moreover, it would be improper under any circumstances to require licensees to construct more than one path prior to filing their FCC form 494A and initiating commercial operation. 38 GHz service is unique, because in virtually all circumstances, it provides private-line service over custom-tailored transmission paths between customer-designated points. In contrast to services like cellular and PCS, with the exception of limited network control capability, there is no requirement for a centralized network infrastructure in order to facilitate service to individual customers.

For these reasons, requiring the construction of more than one path for service initiation would prohibit licensees from timely responding to individual customer requirements. A carrier cannot know where a link will be installed until a customer places an order. Accordingly, if any construction milestones beyond the current eighteen month maximum for initiation of services, combined with bi-annual reporting requirements, are necessary - which market forces are likely to disprove in short order - such requirements should never be made a condition precedent to filing a Form 494A and the initiation of commercial service by an operator. There is simply no evidence that imposing more stringent buildout requirements would lead to any more efficient use of the scarce spectrum resource.

Furthermore, it would certainly be unwise, in the event that the Commission saw a need in the future to explore buildout requirements, to transplant to the 38 GHz band population or geographic coverage concepts that have been applied to cellular and PCS. These types of construction guidelines are based on wide-area coverage system architectures and are clearly inapplicable to the point-to-point private-line characteristics of 38 GHz service offerings.

Pending careful study in rulemaking, the Coalition urges the Commission to take a cautionary approach to questions of buildout

requirements, allowing - for at least some period of time - the marketplace to dictate the pace and nature of system construction. In this way, the Commission will not send signals of uncertainty to the financial community, and it will be able glean important empirical data in the form of the currently required bi-annual reports from the licensees. By taking such data and other input into account, the Commission will be much better able to develop realistic system deployment guidelines in addition to those currently in place - if they are indeed necessary at all. As is true with the industry viability threat attendant to licensing delays, any material change at this time in deployment authority or thresholds for the initiation of commercial service by 38 GHz operators could be fatal to the industry.

C. Allow The Marketplace To Determine The Ultimate Service Demographics

As a final matter, the Coalition strongly recommends that the Commission allow market forces rather than artificial requirements and regulatory delay to determine the ultimate configuration of 38 GHz systems in the marketplace. In issuing the NPRM and conducting the upcoming rulemaking proceedings, the Commission should take great care not to create any unnecessary roadblocks whatsoever in the development of the 38 GHz industry. The Commission should also assiduously avoid proposing or adopting any rules or policies that inhibit 38 GHz industry players from maximizing their ability to obtain financing and to fully exploit the impact of their hard-earned investment capital.

For example, the Commission should continue to accept and timely process administrative filings, such as ownership transfer and license assignment applications. The Commission should also allow cooperative equipment procurement and system construction efforts that serve the public interest by lowering costs and speeding the delivery of services to the public. Similarly, the Commission should not impose artificial limits on the channel capacity that licensees can access through cooperative use agreements and other business arrangements.

The Commission has long recognized that the marketplace is the best determiner in making the difficult decisions that shape the establishment of new services. The members of the 38 GHz Coalition are among the leading pioneers of the 38 GHz industry. Each of the Coalition members has invested substantial capital and other resources in its efforts to pursue its own business plans. Much progress has occurred to date -- system implementation plans are moving forward at a rapid pace, many new

jobs have been created, and innovative new competitive services are poised to come to market. It is up to the Commission to ensure that artificial and unnecessary regulatory barriers do not inhibit this rapidly maturing industry.

IV. Conclusion

As set forth in detail in this letter, the informal industry coalition, consisting of the undersigned parties, urges the Commission to process all applications filed prior to the 38 GHz Application Freeze, allowing a reasonable period for completion of frequency conflict resolutions of at least ninety days after issuance of the impending Notice of Proposed Rulemaking to address 37 GHz and 38 GHz band issues. The Coalition also asks the Commission not to propose or adopt any new rules or policies that might create uncertainty as to construction requirements, or impede in any other way the ability of 38 GHz licensees to flexibly deploy transmission paths throughout their authorized service areas. Finally, the Coalition maintains that the Commission should continue to support rules and policies that permit market forces instead of regulatory delay to determine the ultimate mix of 38 GHz system capacity, services, and service providers.

Each of the undersigned parties is of the firm belief that immediate Commission adoption of each of the recommendations contained herein will serve the public interest, convenience, and necessity. Accordingly, the 38 GHz Coalition respectfully requests that Commission proposals contained in the NPRM be fully consistent with the positions stated herein.

Respectfully submitted,

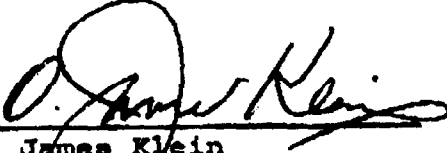
THE 38 GHz COALITION

By: The Undersigned Parties

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By

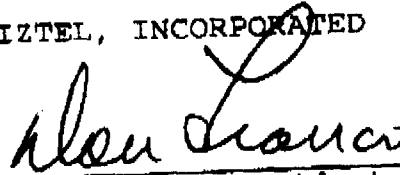

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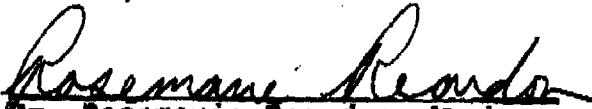
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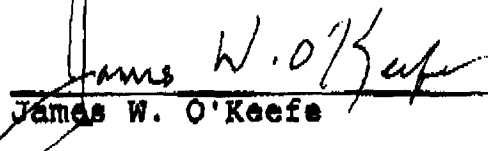
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